

LAW OFFICES OF  
**KENNETH P. JACOBUS, P.C.**  
A PROFESSIONAL CORPORATION  
310 K Street, Suite 200  
ANCHORAGE AK 99501-2064  
TELEPHONE (907) 277-3333  
FAX (907) 264-6666

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Alaska State Legislature  
Senate Judiciary Committee  
Alaska State Capitol  
Juneau AK 99801

Re: SB 140 - Alaska Act Relating to School Athletics, etc.

Dear Chairman Holland and Committee Members:

I am writing to comment on this bill. I have daughters, granddaughters, and nieces with daughters. Some of them participate in athletic activities, and should be allowed to compete fairly.

I do not think that there is any dispute that on the average, there are significant biological and physiological differences between males and females. This includes the fact that males, in general, are larger, and have greater strength, speed and endurance. Females should not be required to compete against males. This situation has become more complicated in the past few years because a few transgender persons (those that were born with one gender but decided to change gender at some point later in their lives) are now in the mix.

The question that I have been asked to address is whether or not SB 140 violates any Constitutional provision. I have reviewed the opinion written by Marie Marx for Senator Tom Begich dated March 2, 2022.<sup>1</sup> She is correct in the sense that these issues are not decided, and are presently in the course of litigation. It is difficult to predict how the courts will rule on these issues. However, the Legislature should not be deterred from passing SB 140 because there may be unanswered Constitutional questions. The Legislature should act in what it determines to be in the best interests of the vast majority of Alaskan girls and woman that want to fairly participate and compete in athletic endeavors.

**1. The Application of Right to Privacy has not been Decided by the Alaska Courts.**

I do not know how the Alaska Court will rule on right to privacy. The State has a legitimate interest in protecting its female athletes from unfair competition in state schools. Even if requiring a student to disclose their biological sex when desiring to participate in athletics is an invasion of the right to privacy (which I do not believe it is), it seems to be a de minimus interference with the right to privacy. Balancing the State's interest against the

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<sup>1</sup> Today I became aware that Ms. Marx has written subsequent opinions, but I have not had an opportunity to review those.

simple requirement of correctly identifying one's biological sex seems to be a minor interference which does not negate the State's interest.

## **II. There may not be an Equal Protection Violation.**

Another point raised in Ms. Marx's memo is that it might be a Constitutional violation of equal protection to prohibit a transgender female from competing against females, but not preventing a transgender male, or any other female for that matter, from participating on male teams and competing against males. There is a rational distinction here, which is the greater strength, speed and endurance of males. If a female or a transgender male desires to participate in a contest where she is at a disadvantage, there is no unfairness present.

The case of Bostock v. Clayton County, 590 U.S. \_\_\_\_ (2020) is the case most relevant at the present time. It is a very lengthy 6-3 opinion. Some argue that this case portends a result in favor of transgenders in regard to student athletics. Others argue that this case does not do so. I tend to agree that Bostock is a substantially different case and does not apply.

Bostock was a case decided under Title VII, employment discrimination. Three lower court cases were consolidated. In one, Gerald Bostock was fired after he began participating in a gay recreational baseball league. In the second, Donald Zarda was fired days after he mentioned that he was gay. In the third case, Aimee Stephens was fired because she presented as a male when she was hired, and then told her employer that she planned to live and work as a woman. These three firings were simply firings based on status as gay or transgender under Title VII. There were apparently no other factual factors involved.

The cases involving student athletics are decided under Title IX. In addition, the cases deal with more than status. They deal with the differences in athletic ability - strength, speed and endurance - between men and women.

There was another interesting case which I hoped would be decided and taken to the United States Supreme Court. A lawsuit was filed in Connecticut by three cisgender runners, who alleged that they were deprived of wins, titles and athletic opportunities by being forced by the State to compete against two transgender sprinters. This case was closely watched, and also demonstrated that this issue is more political than legal. The Trump Administration Justice Department and the Education Department's Office for Civil Rights supported the plaintiffs. The Biden Administration withdrew this support in February, 2021.

The Connecticut lawsuit was dismissed by the Court on procedural grounds, so there is no decision. The two transgender sprinters had graduated, and the plaintiffs could not identify any other transgender athletes. So, the case was rendered moot.

If there is concern about an equal protection violation, the legislation could be amended to prohibit girls on boys' teams, just like boys are prohibited on girls' teams.

### **3. Proposed AS 14.18.160 Appears Valid**

All that proposed AS 14.18.160 says is that schools and school districts are protected from adverse actions from certain names entities, resulting from their following the law, i.e., AS 14.18.150.

AS 14.18.160 does not say that someone cannot go to court to obtain a declaration of unconstitutionality or other appropriate relief. In fact, this is clear. There is no interference with access to courts as a result of AS 14.18.160. Also, there is no interference with the rights of any individual to take any action that individual deems necessary and appropriate, including going to court..

### **4. Proposed AS 14.18.170 Appears Valid.**

AS 14.18.170 simply creates private causes of action and provides a statute of limitations within which to bring such actions. This is common.

Any private cause of action must be based on a violation of AS 14.18.150. Private causes of action for violation of statute are also common.

Also, the standards for bringing a cause of action, the burden of proof, the amount and type of damages, and the requirements of each individual case are determined by the courts. The courts evaluate each individual case. It is not possible for the Legislature to anticipate every factual situation that might exist when it enacts its laws.

The examples cited by the State - a student with Turner's syndrome or one who looks masculine - are not relevant to the filing of a private cause of action. Turner's syndrome affects only females, so the student must be a woman. Same with "masculine looking" which must apply to women. Again, if this issue is a problem, it has to be resolved by the courts based on the facts of each individual case. The student's status as a female does not affect her right to file a private cause of action for violation of AS 14.18.150.

### **5. The Federal Law is Undecided.**

This questions is discussed in Section 2 above. The federal law is undecided.

It is correct that District Court judges in Idaho and West Virginia issued injunctions against the enforcement of similar laws, pending a trial. There was also a Tennessee case filed earlier this year, which is going to trial on March 21, 2023. Presently, these cases are being considered at the District Court level, and in only a very few jurisdictions.

In order for the federal law to be decided with a broad application, there must be a decision of the United States Supreme Court, or a decision of a Court of Appeal which would be applicable to that circuit.

Senate Judiciary Committee  
May 1, 2022  
Page 4

In conclusion, given the presently unsettled state of the law, I would against suggest that the Legislature should act in what it determines to be in the best interests of the vast majority of Alaskan girls and women.

I would also suggest that sex be defined as “biological sex at birth.” This would avoid arguments that might be made that a person actually changed biological sex by taking hormone or other treatments later in life.

Thank you for your consideration of this request. If you have any particular questions, please let me know. I have listened to the hearing on April 22, 2022, and am aware of the comments at that meeting. I intend to attend the hearing at 9 a.m. on May 2, 2022, if you have any questions..

Very truly yours.

KENNETH P. JACOBUS, P.C.

By   
Kenneth P. Jacobus

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